Supreme Court, U.S.
FILED

94 702 SEP 12 1994

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

James Kassouf, Elias Kassouf, Margaret Kassouf, In the Matter of the Owners and Occupants of the Properties located at 1476 Davenport, 25984 Woodpath Trail, and 9131 Tracy Trail,
Petitioners,

v.

United States of America,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JAMES KASSOUF
ELIAS KASSOUF
MARGARET KASSOUF
1476 Davenport
Cleveland, Ohio 44114
(216) 696-6343

Pro Se for Petitioners.

QUESTIONS PRESENTED

I. Whether the public's First Amendment right of access to criminal proceedings encompasses the search warrant procedures.

II. Whether Federal Rule of Criminal Procedure 6(e) supercedes the public's First Amendment right of access to search warrant proceedings.

PARTIES

The Owners & Occupants of The Properties Located at 1476, 25984 Woodpath Trail, and 9131 Tracy Trail, listed as Petitioners in the instant case, includes James Kassouf, as well as his parents, Elias and Margaret Kassouf.

TABLE OF CONTENTS

QUESTION PRESENTED.....ii

PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....vii

JURISDICTION.....viii

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.....viii

STATEMENT OF THE CASE.....1

REASONS FOR GRANTING WRIT.....8

I. THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUIT COURTS AS TO WHETHER THERE IS A FIRST AMENDMENT RIGHT OF ACCESS TO WARRANT PROCEEDINGS.....8

II. PETITIONERS' FIRST AMENDMENT RIGHT OF ACCESS TO SEARCH WARRANT PROCEEDINGS SUPERCEDES THE BLANKET APPLICATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 6(E) REGARDING THE SECRECY OF ON-GOING INVESTIGATIONS AND GRAND JURY INFORMATION.....19

CONCLUSION.....26

APPENDIX.....1a

TABLE OF AUTHORITIES

CASES Page

Baltimore Sun Co. v. Goetz,
886 F.2d 60 (4th Cir. 1989).....9,14

Douglas Oil Co. v. Petrol Stops Northwest,
441 U.S. 211 (1979).....24

Franks v. Delaware,
438 U.S. 154 (1977).....12

Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982).....19,24

In re Knoxville News-Sentinel Co.,
723 F.2d 410 (6th Cir. 1983).....10,22

McDonnell Douglas Corp. v. Pultizer Publ. Co.,
895 F.2d 460 (8th Cir. 1990).....10

Nixon v. Warner Communs., Inc.,
435 U.S. 589 (1978).....14,17

Offices of Lakeside Nonferrous Metals, Inc. v. U.S.,
679 F.2d 778 (9th Cir. 1982).....23

Press-Enterprise Co. v. Superior Court,
464 U.S. 501 (1984).....8,9,10,13,14,18

Press-Enterprise Co. v. Superior Court,
478 U.S. 1 (1986).....8,11,23

Richmond Newspaper, Inc. v. Virginia,
448 U.S. 555 (1980).....9

Times Mirror Co. v. United States,
873 F.2d 1210 (9th Cir. 1989).....9

United States v. Calandra,
414 U.S. 338 (1974).....13

United States v. Modern Bookkeepers,
780 F.2d 1023 (6th Cir. 1985).....22

STATUTORY & CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I. .....passim
U.S. Const., amend. IV.....13,14,15
Federal Rule of Criminal Procedure 6(e)
.....19,20
Federal Rule of Criminal Procedure 41(g)
.....14

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

James Kassouf, Elias Kassouf, Margaret Kassouf,
In the Matter of the Owners and Occupants
of the Properties located at 1476 Davenport,
25984 Woodpath Trail, and 9131 Tracy Trail,
Petitioners,
v.
United States of America,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, James Kassouf, Elias Kassouf, and Margaret Kassouf (hereinafter "Petitioner"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Sixth Circuit In the Matter of the Owners and Occupants of the Properties located at 1476 Davenport, et al. v. United States of America, 6th Cir. No. 93-3598 (June 14, 1994).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, Case No. 93-3598, was a bench ruling with no written opinion filed. The Order set forth by this court is reproduced here as Appendix, page 11 (hereinafter A.11).

The opinion of the United States District Court for the Northern District of Ohio, Case No. 1:91 MG 04135-04137, is unreported and is reproduced here as A.1.

JURISDICTION

The United States Court of Appeals for the Sixth Circut issued its opinion and judgment on June 14, 1994. This petition was timely filed within ninety days of that date.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution which provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

> right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case also involves the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In addition, this case also involves Federal Rule of Criminal Procedure 6(e) set forth in Appendix C.

Finally, this case involves Federal Rule of Criminal Procedure 41(g) which states in pertinent part:

> The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers

in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

STATEMENT OF THE CASE

On October 25, 1991, Magistrate Bartunek signed search warrants for three locations: 1476 Davenport Avenue, 25984 Woodpath Trial and 9131 Tracy Trail. The Magistrate also signed an order to seal the search warrant affidavits based upon the general assertion by the Government that secrecy was needed as a result of investigatory proceedings which included witness interviews and examination of business records and transactions.

October 29, 1991, federal agents conducted highly publicized searches at all three addresses. Although the warrants authorized a search for only business records, the agents seized voluminous household records in addition to business records at each location.

At the residence of Petitioners' Elias and Margaret Kassouf, at 9131 Tracy

Trail, the agents intrusively searched the Petitioners' residence, including drawers containing lingerie and personal items of the elderly couple, respectfully 70 and 74 years of age at the time of the search. In addition, federal agents searched Petitioner James Kassouf's residence, at 25984 Woodpath Trail, occupied by Petitioner, his expectant wife and two sons.

During the search of Petitioner James Kassouf's residence, the presence of numerous federal agents became distressing for Petitioner's wife, of whom was nine months pregnant at that time. This resulted in the agents contacting Petitioner's attorney, urging him to come to the Woodpath Trail residence to reassure Mrs. James Kassouf.

The premises at 1476 Davenport serves as the headquarters for the

parking and real estate businesses in question. Federal agents searched these premises, as well, for more than six hours. This search prevented corporate employees from performing their work, in addition to being subjected to interrogations outside the presence of counsel.

The searches conducted by the federal agents were not only intrusive, but were highly publicized as well. Shortly after the warrants were served, media reporters appeared at the sites. On the following day, October 30, 1991, the Plain Dealer described the searches in a front-page story containing extensive quotations by Dante Marrazzo, Chief of the Internal Revenue Service Criminal Investigation Division. The Plain Dealer article reported that the seized records included paper and

computerized financial and investment records, federal UDAG grant applications and related data.

Mr. Marrazzo publicly commented to the media that the searches were part of a five-year investigation into allegations of tax fraud, bank fraud and public corruption. Mr. Marrazzo commented that the investigation began with information provided by the Cleveland Police Department. It was further revealed that the IRS sought records from 121 different business partnerships and firms associated with Petitioner for the period of August, 1982, to December, 1990.

The search warrants and inventories were returned and filed in November, 1991. However, the search warrant affidavits continued to remain sealed.

On November 7, 1991, a motion to

unseal the search warrant affidavits was filed on behalf of Petitioners. Both parties filed memoranda and reply briefs in support of their respective positions.

Petitioners asserted that the search warrant affidavits should be unsealed because there was no apparent justification for secrecy, particularly in light of the publicity that the Government itself had engendered about the investigation. The Government vaguely argued that the unsealing of the affidavits would reveal names of potential and current witnessess, as well as targets, which could cause potential destruction of documents and create some undescribed impediment to gathering testimony from witnesses.

At a hearing before the Magistrate on December 3, 1991, Petitioners established that at least some of the

information in the affidavits was derived from public records and from interviews of government witnesses.

On December 11, 1991, the Magistrate entered an order denying the motion to unseal the search warrant affidavits. The Magistrate declined to apply the favored mechanism of redaction of affidavits in accordance with Federal Rule of Criminal Procedure 6(e).

The Magistrate adopted the Government's claim that disclosure of the affidavits would jeopardize the ongoing criminal investigation, ignoring the fact that the Government had publicly revealed the nature, scope and origination of the investigation to the media on October 29-30, 1991. Despite increasing judicial recognition for opening all records to public inspection, the Magistrate incorrectly adopted the Government's

conclusory assertions that sealing was necessary because of the ongoing investigation. (A.1)

Petitioners filed a timely notice of appeal in the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals entered an order on June 14, 1994. The Court did not render a written opinion, rather, the Court made a bench ruling affirming the District Court's decision to seal the affidavits in light of the on-going investigation. (A.11-12)

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUIT COURTS AS TO WHETHER THERE IS A FIRST AMENDMENT RIGHT OF ACCESS TO WARRANT PROCEDURES.

This Court has established that a First Amendment right of access to certain pre-trial proceedings in criminal cases does exist. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7-9 (1986). This First Amendment right of access continues the long standing tradition of openness found in our criminal proceedings so recognized by this Court in Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 507 (1984). In Press, Justice Burger furthered this Court's support for openness with regards to criminal proceedings by stating in his opinion

that such openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to pubic confidence in the system." Id. at 507 (citing Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 569-571 (1980)).

In the application of this First Amendment right of access to criminal proceedings, the federal circuit courts of appeals are in direct conflict in the application of this right with regards to warrant procedures. The Fourth and Ninth Circuits have held that no First Amendment right of access attaches to warrant procedures. Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989); Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989). Yet, the Sixth and Eighth Circuit Courts have held that the First Amendment right of access does

apply to the search warrant procedures, thereby, creating a direct conflict among the circuit courts. In re Knoxville News-Sentinel Co., 723 F.2d 470 (6th Cir. 1983); McDonnell Douglas Corporation v. Pulitzer Publ. Co., 895 F.2d 460 (8th Cir. 1990).

As a matter of legal tradition and public policy, the openness of criminal proceedings helps to establish that "procedures are being followed and that deviations will become known." Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 507 (1984). The public interest demands that the conflict of openness regarding warrant proceedings that exists between the federal circuit courts of appeal be resolved by an explicit holding that the First Amendment right of access to criminal proceedings does encompass the

search warrant procedures.

In establishing a First Amendment right of access, this Court set forth a two-prong test to be applied in granting access to criminal proceedings. This Court held that in granting this qualified First Amendment right of access the court should consider "whether the place and process have historically been open to the press and general public. ... [and] whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 8 (1986).

In applying the Press test to warrant procedures, this Court must assess whether or not the warrant process is generally open to the public and whether such access promotes a particular

purpose. Id. In the efforts by this Court, as well as our justice system, to ensure fairness in the criminal proceedings, it would seem that there is no better place for openness than during the warrant procedures, whereby, generally all criminal prosecutions begin.

It is uncontested that there is a practice of secrecy in warrant proceedings. Franks v. Delaware, 438 U.S. 154 (1977). Such secrecy results as a measure for preventing the subject of the search from being disclosed in prevention of destruction or removal of the evidence. Id. at 169. However, this Court has established that once the warrant has been executed, a defendant does have a right to challenge the truthfulness of the affidavit in support of the warrant in question. Id.

In furtherance of this sense of fairness, the Fourth Amendment to the United States Constitution helps to clench any injustice by mandating that search and seizures be conducted by warrants issued only upon sufficient probable cause. United States v. Calandra, 414 U.S. 338, 354 (1974). The "warrant clause" found within the Fourth Amendment helps to assure that individuals, like the Petitioner, will be free from "unreasonable governmental intrusions into the privacy [of their] person, house, papers, or effects." Id. at 354.

In furthering this idea of public awareness, this Court has established that the public has both a common law and First Amendment right of access to documents filed in court. Press-Enterprise Co. v. Superior Court of

California, 464 U.S. 501, 507 (1984); Nixon v. Warner Communs., Inc., 435 U.S. 589 (1978). Federal Rule of Criminal Procedure 41(g) mandates that a search warrant and all papers relating to it be filed openly. It has been established that affidavits for search warrants are judicial records that must be filed. Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989).

Thus, in the interest of public policy, the granting of the First Amendment access to search warrants would only help to further the constitutional guarantee from unreasonable governmental intrusion established within the Fourth Amendment. This access would help to ensure the tradition of openness in criminal proceedings that our legal system has been founded upon and that this Court so openly advocates. Press-Enterprise Co.

v. Superior Court of California, 464 U.S. 501 (1984).

The instant case is an ideal vehicle for the recognition of this principle that the First Amendment right of access to criminal proceedings does include search warrant procedures as well. This Court has acknowledged the continued tradition for openness in criminal proceedings in promotion of fairness. Id. Such need for access to search warrant procedures is clearly present in the instant case.

In this case, Petitioners were subject to a search an seizure pursuant to the Fourth Amendment, whereby, Petitioners were denied his right to properly challenge the "reasonableness" of the search. Petitioners have been continuely denied access to the search warrant affidavit, thereby, tieing

Petitioners' hands, obstructing Petitioner from properly challenging the validity of the search warrant affidavit, and subjecting them to governmentally intrusive search and seizures.

In the case at bar, Magistrate Bartunek issued warrants on October 25, 1991, whereby, the affidavits in support of these warrants were sealed. Even after the warrants had been executed and all of the evidence seized as pursuant to the search warrants, Magistrate Bartunek still refused to unseal the affidavits, denying Petitioners' right to even a redacted version of the affidavits.

The Sixth Circuit Court of Appeals, as well as the Northern District Court, continues to ignore Petitioners' right of access to this affidavit based upon their finding that the on-going investigation superceded any First Amendment right of

access the Petitioners might have to the warrant affidavit. This Court has acknowledged that courts do have the inherent power to control papers filed with the courts, denying access to these papers within certain constitutional limitations. Nixon v. Warner Communs., Inc., 435 U.S. 589 (1978). The governmental investigation has been ongoing for five years or more, of which the affidavit has been sealed for two and half of those years. It would arguably seem that such investigation and evidence should be fully conducted at this point, with no need for such continued secrecy regarding the affidavit.

It would seem that such judicial control over the papers filed with the court should not supercede Petitioner's First Amendment right of access to the warrant affidavit. Such a finding would

be contrary to Petitioners' constitutional safeguard to be free from intrusive governmental search and seizures, contradicting this Court's continued support of fairness found pursuant to the First Amendment right of access to criminal proceedings. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984).

Petitioners respectfully submits that this important issue, whether the public's First Amendment right of access to criminal proceedings encompasses the search warrant proceedings, is worthy of authoritative resolution.

II. PETITIONERS' FIRST AMENDMENT RIGHT OF ACCESS TO SEARCH WARRANT PROCEDURES SUPERCEDES THE BLANKET APPLICATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 6(E) REGARDING THE SECRECY OF ON-GOING INVESTIGATIONS AND GRAND JURY INFORMATION.

To ensure the public's First Amendment right of access to criminal proceedings, this Court specifically set forth in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-607 (1982), that when the State attempts to deny access to "sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." In applying this standard, the Sixth Circuit Court, as well as the Northern District Court, erred by finding that on-going investigations pursuant to

Federal Rule of Criminal Procedure 6(e) necessitated a compelling governmental interest which outweighed Petitioners' First Amendment right of access to the search warrant affidavit.

In dening Petitioners access to the warrant affidavit, the Northern District Court set forth that the warrant affidavit should remain sealed to help ensure the Government's ongoing investigation. (A.1) The District Court stated that Petitioners could successfully challenge the validity of the search warrant by merely looking at the face of the warrant. This Court is very much aware that the face of a search warrant only describes the evidence to be seized and the area in which to seize it.

In challenging a search warrant, Petitioners need to be able to have access to the search warrant affidavit

which supported the governmental search and seizure. It is illogical to assume that Petitioners would be equipped to successfully challenge this search, or for that matter any search, without the knowledge of what substantiated probable cause in granting the search warrant to begin with.

The Sixth Circuit, in their oral ruling, did acknowledge that Petitioners were at a disadvantage, but nonetheless, denied Petitioners even a redacted version of the warrant affidavit. The Sixth Circuit set forth that a redacted version would merely be a hollow gesture, irrespective of what significant importance it held to Petitioner's right to effectively challenge this intrusive search and search by the Government.

It cannot be established that the unsealing of the affidavit would

jeopardize the government's on-going investigation in the instant case. The investigations undertaken by the IRS were made very public by their own agents, whereby, such agents were quoted in the Plain Dealer with regards to the movement of the on-going investigations.

In asserting their discretion, courts should only invoke the sealing of an affidavit when specific facts and circumstances support a compelling governmental basis. United States v. Modern Bookkeepers, 780 F.2d 1023 (6th Cir. 1985); In re Knoxville News-Sentinel, 723 F.2d 470 (6th Cir. 1983). It would seem hard-pressed to imagine that this Court would find that a continued compelling need exists in the secrecy of on-going investigations of which were made very public by the IRS themselves.

In Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986), this Court held that pursuant to the First Amendment to the United States Constitution, a qualified right to public access to preliminary proceedings in a criminal prosecution does exist. A defendant's right to have access to the criminal proceedings, i.e. warrant affidavits, helps to insure that the Government does not rely upon secrecy to delay or manipulate the investigative proceedings. Offices of Lakeside Nonferrous Metals, Inc. v. United States, 679 F.2d 778 (9th Cir. 1982). There could be no more a compelling interest than to be secure from governmental intrusions, as well as having the ability to adequately defend oneself against criminal prosecutions. Petitioners' constitutional right to be secure from

intrusive governmental actions, so secured by their First Amendment right of access to the warrant affidavit, would substantiate a more compelling need. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-607 (1982).

Although this prevailing First Amendment right to warrant affidavits exists, this Court has recognzed that an affidavit may be sealed in order to protect grand jury information. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). However, if warrant affidavits are sealed, this Court has acknowledged that a less restrictive means in assuring secrecy of on-going investigations and grand jury information cannot exist. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). If a less restrictive means does exist, such

procedure should be applied to the affidavit process. Id.

In the instant case, the Sixth Circuit and the Northern District Court erred by sealing the affidavit since a less restrictive means of access to the affidavit information did exist. The courts could have released a redacted version of the search warrant affidavit, but failed to do so. Both courts indicated that such a gesture would be hollow in nature and of no substantial help to Petitioners. (A.1-12)

Thus, the Sixth Circuit, as well as the Northern District Court, blatantly erred in denying Petitioners' First Amendment right of access to the search warrant affidavit or even a redacted version of such affidavit.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

James Kassouf
1426 Davenport
Cleveland, Ohio 44114
(216) 696-6343

Pro Se for Petitioners

APPENDIX

BEST AVAILABLE COPY

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

No. 1:91 MG 04135-04137

In the Matter of the Owners and Occupants of the Properties located at 1476 Davenport, 25984 Woodpath Trial, and 9131 Tracy Trail.

ORDER

[Filed December 11, 1991]

J.W. BARTUNEK, MAGISTRATE JUDGE

This matter comes before the magistrate judge upon the motion of the movants to unseal the affidavits for the search warrants for 1476 Davenport Ave., 25984 Woodpath Trail, and 9131 Tracy Trail. Upon review of the facts, the arguments at the hearing, and the controlling law, the affidavits will remain sealed.

I.

On October 25, 1991, this Magistrate Judge signed the search warrants for the above stated properties. At that time the court also granted the Government's motion to seal the affidavits for the search warrants. The search warrants were executed on October 29, 1991, by agents of the Internal Revenue Service (IRS). Extensive business records were seized from each property. The search warrants and inventories were returned and filed on or about November 1, 1991.

Movants claim that the affidavits in support of the warrants should not be kept under seal because they have a need and right to see them and that the Government has not shown that they have a compelling interest in keeping the affidavits under seal or, in the

alternative, that there is no other way, such as redaction, to the complete sealing of the affidavits.

On December 3, 1991, upon request of the movants, there was a hearing before Magistrate Judge Joseph W. Bartunek on the motion to unseal the affidavits. At the hearing, movants called the affiant, a special agent for the IRS, as a witness and asked him about the contents of the affidavit. Although the agent did not reveal any specific information, he did testify to the fact that the affidavit did contain material from the grand jury and substantial information that would jeopardize the ongoing investigation if it was available to the public. The Government did provide the movants with a redacted version of the motion to seal.

Although there are other issues regarding the warrants presently in dispute, the only issue before this court is whether the affidavits for the search warrants should remain under seal.

II.

The circuit courts have not come to an agreement on the necessary requirements to seal an affidavit of a search warrant. The Ninth Circuit has ruled most favorably in allowing the court to seal the affidavit. In Times v. Mirror Co. v. United States, 873 F.2d 1210, 1218-19 (9th Cir. 1989), the court held that the public has no right of access to search warrant materials while a preindictment investigation is ongoing, because the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials

in the midst of a preindictment investigation.

Other courts have required that a party seeking to have material sealed must show that closure is essential to preserve higher values and is narrowly tailored to that interest. In re Search Warrant for Secretarial Area - Gunn, 855 F.2d 569, 574 (8th Cir. 1988); In re New York Times Co., 828 F.2d 110, 116 (2nd Cir. 1987). The Government would have to show that there is a compelling Government interest for sealing the affidavit. Furthermore, these courts have required that alternatives to sealing the documents, such as disclosing some of the documents or giving access to a redacted version, must be considered. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 66 (4th Cir. 1989).

However different the circuits may be on the general rule, the courts do tend to agree that an ongoing criminal investigation and matters occurring before the grand jury would justify the sealing of an affidavit. In Re Search Warrant for a Secretarial Area, 855 F.2d at 574; In Re Grand Jury Subpoena, 920 F.2d 235, 241 (4th Cir. 1990). In the Sixth Circuit, "matters occurring before the grand jury" does not only pertain to actual testimony, but also to protect the interest of those brought before the grand jury. In Re Grand Jury Proceedings, 851 F.2d 860, 865 (6th Cir. 1988); United States v. Proctor & Gamble Co., 356 U.S. 677, 681, n.6 (1958).

III.

Here, the Government has provided this court through motions and briefs,

filed both publicly and under seal, with enough information under any of the courts' decisions, for the magistrate judge to determine that the affidavits should remain under seal.

The Government has demonstrated that restricting access to the affidavits is necessitated by a compelling government interest, and ongoing investigation and protecting material from the grand jury. Although the movants assert that the Government's arguments are conculsory and therefore should not allow them to prevail on the issue, the court upon review of the restricted information finds the Government's concerns and interests well taken. The matters relied upon in the affidavit described in considerable detail the nature, scope and direction of the Government's investigation and the individuals

involved. There is a substantial probability that the Government's ongoing investigation would be severely compromised if the sealed documents were released.

When weighing the interests of the Government against those of the movants, the Government's interests prevail. The movants argue that they have a need for the affidavit because the agents exceeded their authority when they conducted the search. However, to successfully demonstrate that the agents exceeded the authority of the warrant, all one needs to examine is the face of the search warrant, which the movants have. Access to the affidavit will not substantially aid in the movants' attempts to have seized property returned.

Since the court finds that the Government's interest in protecting the

ongoing investigation outweighs any need of the movants for the material, the court must consider any alternative to sealing the complete affidavit. Upon consideration of the affidavit, the magistrate judge finds that a redacted version of the affidavit would not be practicable. The grand jury evidence and investigation revealing the nature or scope of the Government's ongoing investigation so profuse and so inextricably intertwined throughout the affidavit that it would not be possible to create a redacted version of the affidavit. Furthermore, the Government d d provide a redacted version of the motion to seal at the hearing.

IV.

Therefore, after balancing the interests of the Government and of the movants the magistrate judge finds that

the Government's compelling interest in an ongoing criminal investigation and protection of grand jury testimony outweighs the interests of the movants to view the affidavit at this time. Furthermore, the magistrate judge finds that due to the abundance of information that needs to be protected throughout the affidavit, there is no alternative to the complete sealing of the affidavit. Thus, movants' motion to unseal is DENIED.

IT IS SO ORDERED.

/s/ Joseph W. Bartunek
JOSEPH W. BARTUNEK
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3598

In the Matter of the Owners and Occupants of the Properties located at 1476 Davenport, 25984 Woodpath Trial, and 9131 Tracy Trail,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

ORDER

[Filed June 14, 1994]

BEFORE: GUY and BOGGS, Circuit Judges; and WOODS, Senior District Judge.

This cause having come on to be heard upon the record, the briefs and the oral argumet of the parties, and upon due consideration thereof.

The Court finds that no prejudicial error intervened in the judgment and

proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF
THE COURT
/s/ Leonard Green
Leonard Green
Clerk

---

*The Honorable George E. Woods, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

Federal Rule of Criminal Procedure 6(e) states in pertinent part:

> (1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.
>
> (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to-

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which

was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made-

(i) When so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be hear.

(4) Sealed Indictments. The federal magistrate judge to show an indictment is returned may direct that the indictment be kept secret until the defendent is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall

disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate judge in open court. If a complaint or informtaon is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate judge in writing forthwith.

(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of grand jury for a period of six months or less upon a determination that such extension is in the public interest. At anytime for cause shown the court may excuse a juror either

temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.